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June 14, 2005

Via Email and U.S. Mail

Matthew D. Cohn
Environmental Protection Agency
Region VIII - 8RC 999 18th Street, Suite 500
Denver, CO 80202-2466

Re: Vermiculite Intermountain Site, Salt Lake City, Utah

Dear Matt:

Thank you for your letter dated May 26, 2005, which sets forth EPA's suggestions for a global settlement allocation between the Vermiculite Intermountain Superfund Site ("Site") potentially responsible parties. After careful review of your letter with our client, PacifiCorp, we provide the following response.

1. EPA's Evaluation of PacifiCorp's Liability

As we have discussed previously, and as you noted in your letter, PacifiCorp continues to contest that Intermountain Insulation, which changed its name to Vermiculite Intermountain in August 1954, operated an exfoliation plant on the Site prior to 1954, when Utah Power and Light Company (Utah Power) sold a 72.5 foot by 198 foot parcel of property adjacent to the 3rd West Substation ("Lease Property") to the Utah Lumber Company.

EPA appears to base its position on a 1947 DOI publication discussing the marketing of vermiculite, which identifies Intermountain Insulation Company at "333 West First South St., Salt Lake City" as the site of a vermiculite exfoliation facility. However, "333 West First South" is not the address of the Lease Property, which was located at approximately 124 South 300 West.

Furthermore, an internal Utah Power memorandum dated March 10, 1952 states that Utah Power would agree to sell the lease property because "it appears from statements of the Utah Lumber Company that they have been depending on obtaining a piece of this property to carry out certain plans to develop a Zonolite production plant and have made commitments for the equipment to go into such a plant." This suggests that, even if Utah Lumber/Intermountain Insulation was engaged in vermiculite exfoliation prior to the 1954 sale, there was no Zonolite plant on the Lease Property until after the sale. *See* Exhibit 1. In fact, just prior to the 1954 sale Utah Lumber complained to Utah Power that the Lease Property was "unusable" due to a large excavation on the property. *See* Exhibit 2.

At any rate, PacifiCorp believes that additional equitable factors support assigning a greater percentage of the response costs to the Van Cott Trust than to PacifiCorp. As between the Trust and PacifiCorp, your preliminary settlement allocation suggests that PacifiCorp bears approximately eight percent (8%) more responsibility for Site contamination than the Trust. Based on the "Gore factors" and other factors typically considered by courts when allocating fault between PRPs, we believe that a more equitable allocation would impose a much larger degree of responsibility on the Trust. For instance:

- While it is speculative whether or not any vermiculite exfoliation occurred on the Lease Property prior to 1954, it is clear that exfoliation occurred during the Trust's ownership.

- In fact, correspondence between the Trust and Vermiculite Intermountain establishes that the Trust expressly limited Vermiculite Intermountain's use of the property to activities related to its Zonolite operations. *See* Exhibit 3 (Letter from Jerry L. Brown to Don Wellman, date February 12, 1980) and Exhibit 4 (Letter from Don D. Wellman to Van Cott, Bagley, Cornwall & McCarthy, dated January 21, 1980). In other words, the Trust expressly sanctioned the use of its property for the operation of an exfoliation facility for Libby asbestos.

- Furthermore, even if exfoliation occurred on the Lease Property during Utah Power's ownership, at that time vermiculite was not known to present any health concerns. By contrast, at the time of the Trust's complicity Libby vermiculite was known to contain tremolite, a dangerous form of asbestos. *See* Exhibit 5 (Important Notice to Vermiculite Ore Processors, dated March 17, 1976) and Exhibit 6 (Memorandum from J.L. Wright dated March 17, 1976).

- Apart from speculation that exfoliation may have occurred on the Lease Property prior to 1954, the only other time period during which exfoliation may have occurred during PacifiCorp's ownership was during a brief period in 1984 after Utah Power reacquired the Lease Property. Although it was anticipated that Vermiculite Intermountain would vacate the Lease Property prior to Utah Power's acquisition of the property, Vermiculite Intermountain did not relocate until later. During the interim period, the Trust continued to collect rent from Vermiculite Intermountain during its holdover tenancy on the Lease Property, which rent the Trust split with Utah Power. *See* Exhibit 7 (Letter from Karen G. Matthews to Jerry Brown dated July 12, 1984) and Exhibit 8 (Letter from Trustee of the Van Cott Trust to L.K. Irvine dated March 20, 1984).

- PacifiCorp has continually cooperated with EPA throughout this process and has voluntarily performed a non time critical removal action on the Site. PacifiCorp's timely actions may have reduced any danger to human health and the environment posed by the presence of vermiculite on the Site.

2. EPA's Determination that the Orphan Share Policy is Inapplicable

Also, with respect to your passing statement that "[a]n orphan share is not available, as an affiliation existed between Vermiculite Intermountain and other parties receiving" your letter, we respectfully disagree that PacifiCorp is ineligible for the Orphan Share Policy because of an affiliation with Vermiculite Intermountain.

The Orphan Share Policy authorizes EPA Regions to forgive past costs and projected oversite costs for a site at which there is a significant orphan share. For purposes of the Orphan Share Policy, "orphan share" refers to "that share of responsibility which is specifically attributable to identified parties EPA has determined are: (1) potentially liable; (2) insolvent or defunct; and (3) unaffiliated with any party potentially liable for response costs at the site."

EPA has clarified who is an affiliated party for purposes of the Orphan Share Policy in its January 2001 Orphan Share Superfund Reform Questions and Answers ("Q&A"). The Q&A states:

> An affiliated party can include a liable successor corporation, parent corporation, subsidiary corporation or an individual (e.g., an officer, director, shareholder, or employee). The [Orphan Share Policy] provides that the estimated share for an insolvent or defunct party affiliated with another potentially liable and financially viable party cannot be an orphan at the site for purposes of applying the reform.

> The general approach is that if the financially viable party (*i.e.*, the affiliate) could be liable under a credible legal theory for the share of another party with "no ability to pay," the party with "no ability to pay" should not be considered an orphan.

This explanation is consistent with normal usage of the term "affiliation," which normally refers to a "corporation that is related to another corporation by shareholdings *or other means of control*; a subsidiary, parent, or sibling corporation." Black's Law Dictionary 59 (7th Ed. 1999). Thus, the Q&A is reasonably clear that "affiliation" is used in its ordinary sense and is not analogous with, for example, the "contractual relationship" element of the third party defense set forth in Section 107(b)(3) of CERCLA. PacifiCorp was never related to or capable of exercising any means of control over Vermiculite Intermountain. Consequently, PacifiCorp has never been "affiliated" with Vermiculite Intermountain.

Besides being a departure from conventional usage, deeming PacifiCorp "affiliated" with Vermiculite Intermountain based on their brief, indirect contractual relationship would suggest that the Orphan Share Policy would be unavailable to PRPs who, for instance, purchased property from a liable party (and are thus ineligible for the third party defense) or entered into an arrangement for disposal. This cannot be the intent of the policy since the Orphan Share Policy is regularly used in these contexts. *See, e.g.*, http://www.epa.gove/superfund/programs/reforms/reforms/3-11.htm (describing a "success story" where EPA entered into a settlement for the Interstate Lead Company Site with 20 "financially viable generators").

Nonetheless, we recognize that your proposed settlement allocation does not assign any portion of EPA's past costs to PacifiCorp. We also recognize that Region VIII is under no obligation to exercise the discretion it has been granted under the Orphan Share Policy. We believe, however, that this is a classic orphan share situation and an appropriate circumstance to exercise such discretion in order to limit the burden placed on the remaining PRPs by the actions of a now defunct entity.

3. Clarification as to PacifiCorp's Costs Incurred

Although a final accounting of PacifiCorp's costs has not yet been prepared, it appears that the total will be between $3.3 and $3.5 million, not including legal costs and labor for certain key PacifiCorp employees, including Dave Wilson, PacifiCorp's Principal Environmental Engineer and PacifiCorp employees who replaced substation grounding disturbed by the removal action.

4. PacifiCorp's Proposed Allocation

Based on the foregoing, we respectfully suggest that your proposed settlement allocation be modified as follows:

- PacifiCorp, who has already spent approximately $3.5 million on response work, would pay nothing more and would receive $1.5 million from the Van Cott Trust.

- The Van Cott Trust would; 1) provide $1.5 million to PacifiCorp; and 2) pay all of EPA's past costs not associated with the Frank Edwards Building (approximately $1.5 million).

- La Quinta would pay $500,000 into a trust fund for cleanup of existing contamination on its property and fund all incremental cleanup costs beyond $500,000 as they are incurred, if any. La Quinta would be entitled to a rebate of any money remaining in the trust fund following actual completion of the cleanup. La Quinta would also pay any portion of EPA's past response costs for the Frank Edwards Building, which La Quinta owns, that are not recovered from W.R. Grace or written off by EPA.

We appreciate your assistance in this matter and look forward to discussing this proposal with you at your earliest convenience.

Very truly yours,

MABEY & MURRAY LC

Kevin R. Murray

cc: Mike Jenkins, PacifiCorp
Dave Wilson, PacifiCorp
Jeff Tucker, PERCO
Brian Burnett, Callister Nebeker & McCullough
Mike Keller, Van Cott Bagley Cornwall & McCarthy
Robin Main, Holland & Knight